

OFFICIAL TRANSCRIPT OF PROCEEDINGS BEFORE THE POSTAL REGULATORY COMMISSION

IN THE MATTER OF:)	
)	
COMPLAINT OF GAMEFLY, INC.)	Docket No. C2009-1
)	
)	

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POSTAL REGULATORY COMMISSION

IN THE MATTER OF:)
)
COMPLAINT OF GAMEFLY, INC.) Docket No. C2009-1
)
)

Suite 200
Postal Regulatory Commission
901 New York Avenue, N.W.

Washington, D.C.

Volume 3
Wednesday, June 16, 2010

The above-entitled matter came on for hearing,
pursuant to the notice, at 2:36 p.m.

BEFORE:

HON. DAN G. BLAIR, COMMISSIONER (Presiding)
HON. RUTH Y. GOLDWAY, CHAIRMAN
HON. TONY HAMMOND, VICE CHAIRMAN
HON. Nanci E. LANGLEY, COMMISSIONER

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C O N T E N T S

WITNESSES APPEARING:

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Sander Glick					
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E X H I B I T S

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P R O C E E D I N G S

(2:36 p.m.)

1
2
3 COMMISSIONER BLAIR: And the hearing will
4 come to order. Today's hearing concerns Docket No.
5 C2009-1, the complaint of GameFly, Incorporated,
6 against the Postal Service. I am pleased to be
7 accompanied on the dais today by Chairman Goldway and
8 Commissioners Hammond and Langley. And I would note
9 for the record that Commissioner Acton is unable to
10 attend today's proceedings due to an unexpected family
11 obligation. Before we proceed further I would like to
12 yield to my fellow Commissioners for any brief opening
13 comments that you might have. Madam Chair?

14 CHAIRMAN GOLDWAY: I don't have any comments
15 except that I'm glad to see the meeting is finally set
16 and that we're all here to contemplate the case.

17 COMMISSIONER BLAIR: Thank you. Mr.
18 Hammond?

19 COMMISSIONER HAMMOND: Yes, thank you. I
20 want to thank the Presiding Officer for working with
21 everyone involved to get today's hearing scheduled so
22 that we could keep this case moving forward. And I do
23 want to assure counsel that even though I am only a
24 Commissioner I will to my very best to understand the
25 comprehensive and technical issues that may arise

1 today. Thank you.

2 COMMISSIONER BLAIR: Commissioner Langley.

3 COMMISSIONER LANGLEY: Thank you. I do want
4 to thank the Presiding Officer for his patience with
5 this case, which is now moving into its second year I
6 guess, and also with helping this Commissioner in
7 overcoming her frustration with what I perceive is a
8 slow pace. Commissioner Blair very patiently has
9 explained the need for due process, something that
10 this Commission is well known for, but he has taken
11 time out to explain why it is so important that we
12 proceed with all haste but yet ensure that there is
13 due process, so thank you.

14 COMMISSIONER BLAIR: Thank you, Madam
15 Commissioner, I think that we're all concerned over
16 the pace of the case and I appreciate everyone's
17 comments as well. So today's proceeding is being
18 audiocast, and I would like to lay out some brief
19 guidelines for counsel.

20 In an effort to reduce potential confusion,
21 I would ask that counsel wait to be recognized before
22 speaking, and please identify yourself when
23 commenting. The purpose of today's hearing is to
24 receive GameFly's direct case. Due to the nature of
25 this case a significant amount of materials have been

1 filed under seal or are subject to protective
2 conditions.

3 The Commission takes its responsibility very
4 seriously to protect confidential information.
5 Although we expect witnesses to answer questions
6 fully, I caution today's witness to be aware of
7 materials that are subject to protective conditions
8 when answering questions. If you're uncertain as to
9 whether an answer might involve revealing protected
10 information you may consult with counsel in that
11 limited question prior to answering.

12 As a general rule, all Commission hearings
13 should be public. However, in order to allow a
14 testing of relevant, confidential testimony or
15 exhibits it may be necessary to conduct a portion of
16 today's hearing in-camera. The Commission procedure
17 for conducting an in-camera hearing is to defer
18 questions that must make reference to confidential
19 materials until the conclusion of the day. A fifteen-
20 minute recess is then taken to allow interested
21 observers to become subject to an appropriate
22 confidentiality agreement.

23 The hearing is then reconvened for a
24 separate in-camera session. The transcript for that
25 separate session is maintained under seal.

1 Individuals who choose not to abide by the
2 confidentiality agreement will be excluded from the
3 hearing. Further, we will not audiocast any in-camera
4 proceedings. This is a procedure we would like to
5 avoid if possible.

6 I believe that skilled counsel, of whom we
7 have an abundance today, frequently can develop
8 questions relating to confidential materials that do
9 not specifically reference any confidential
10 information. The Commission would be grateful if
11 counsel was able to conduct cross-examination so as to
12 avoid the need for an in-camera session. I want to
13 raise one other related matter.

14 Many of the documents in this case,
15 including Mr. Glick's testimony, include information
16 identified as nonpublic. I urge counsel when
17 presenting exhibits marked for admission and when
18 referring to exhibits or other documents during cross-
19 examination to take care to clearly indicate whether
20 they are referring to the public or nonpublic version
21 of that document.

22 During the May 5th status conference,
23 GameFly counsel indicated they expected to provide the
24 Postal Service with a copy of its April 12th legal
25 memorandum, marked to eliminate redactions made

1 unnecessary by Commission Order 381 and Presiding
2 Officer's Ruling 17 on confidentiality claims. If a
3 less redacted public version of that memorandum can be
4 provided for the record I think that would help
5 provide transparency in this case.

6 In addition I would like to comment and rule
7 regarding the interrogatories Postal Service-GameFly
8 number 39. I understand the Postal Service has filed
9 a supplemental designation of interrogatory
10 USPS/GameFly 39. That answer was initially filed
11 under seal, but the party involved has no objection to
12 it being made public. Therefore there is no longer
13 any need for that answer to be under seal. I direct
14 that it is removed from under seal status and should
15 be included with the designated responses to be
16 entered into the record this afternoon.

17 And one final note. Mr. Mecone, I believe
18 you have some pressing personal matters to attend to
19 following conclusion of this hearing today, so on
20 behalf of the Commissioners I want to congratulate you
21 and your pending bride on your upcoming wedding. We
22 intend to conclude our business expeditiously today so
23 that you can move on to those more important matters,
24 and if necessary we shall stay beyond normal business
25 hours in order to send you on your way with this phase

1 of the proceeding concluded. Again, our heartfelt
2 congratulations.

3 As we begin are there any procedural matters
4 that counsel wish to raise before we begin?

5 MR. HOLLIES: Mr. Presiding Officer, I am
6 Ken Hollies for the Postal Service. Yes there are a
7 couple of matters we would like to address. A moment
8 ago counsel huddled, including your General Counsel,
9 to discuss the procedures for the witness's public
10 versus nonpublic testimony, and my understanding of
11 where we ended up with that is that we will put the
12 public part in during the public hearing and we will
13 put the nonpublic part in when we convene in-camera.

14 I have another matter I would like to
15 describe and the solutions that have been worked out
16 are a matter of agreement among the parties and, well
17 let me just proceed. It was recently brought to the
18 attention of the parties in this case and also to the
19 Commission that certain sensitive materials had been
20 included in the materials filed in this case and that
21 those sensitive materials really did not need to be
22 part of the case. And there is agreement as to how
23 and when we will extricate those materials from the
24 record.

25 They pertain in particular to the materials

1 for which designation into the evidentiary record
2 today was intended, and as a consequence we have
3 agreed to a small modification to those procedures.
4 And I would note that we have no reason at all to
5 think that what we have worked out will otherwise
6 delay matters in this case, this is just an
7 accommodation to resolve this one set of issues
8 surrounding the sensitive material.

9 What we will need to do is extricate or
10 extirpate that information from the sensitive
11 materials. Our primary focus here is upon
12 interrogatory responses, I think that's all but
13 counsel will clarify that in a moment if necessary,
14 provided by GameFly to the Postal Service. And it
15 looks as though we can go back and in effect
16 reconstruct the responses to exclude the sensitive
17 information with no loss of probity for the purposes
18 of this case.

19 But that has not been accomplished yet, and
20 for that reason we do not intend to submit physically
21 for incorporation into the transcript the specific
22 designations by the parties and by the Commission
23 today. Rather, instead we will expect to accomplish
24 that by Friday, July 2nd, which is two weeks from this
25 Friday. That will allow my co-counsel the

1 opportunities that you just addressed and also allow
2 his return and ability to aid those efforts. I'm not
3 sure I've gotten all of the elements but I think Mr.
4 Levy wants to address these issues in any event, so I
5 would defer to him at this point.

6 COMMISSIONER BLAIR: Thank you, Mr. Hollies.
7 Mr. Levy?

8 MR. LEVY: Thank you, Mr. Presiding Officer.
9 Actually I really have nothing to add. The issue was
10 raised with us about what Mr. Hollies just talked
11 about and we consent to not physically moving into
12 evidence at this time of the items that they have
13 designated as written cross-examination. That's fine
14 with us, since presumably its purpose will be if it's
15 used at all will be used to support the case that
16 they're filing in a few weeks, between now and then is
17 acceptable to us.

18 COMMISSIONER BLAIR: Does the other party
19 think that, anticipate this adding to any delay in the
20 proceedings in this case?

21 MR. HOLLIES: We do not anticipate any delay
22 from this extrication. There may be some delay
23 occasioned by events that are already being
24 undertaken. As an example, the Postal Service is now
25 working on some follow up interrogatories that it does

1 intend to file, and frankly it does not fully expect
2 to complete that process today especially because of
3 the difficulty of sorting out the public from the
4 nonpublic, and we don't want to make a mistake and
5 include in public materials that which has been
6 defined as nonpublic.

7 And that causes, that slows up the process.
8 So for those which are not filed today we will
9 accompany any further interrogatories or requests for
10 admissions with an appropriate motion. There could
11 conceivably be delay occasioned by those, but at this
12 point the Postal Service is quite cognizant of the
13 date for the filing of its direct case, and I have no
14 immediate reason to think that these other procedural
15 occurrences will affect the filing of the Postal
16 Service's direct case.

17 COMMISSIONER BLAIR: Thank you, Mr. Hollies.
18 Mr. Levy, do you want to respond?

19 MR. LEVY: Just briefly. We have not seen
20 obviously the follow up questions, and we will, so I
21 don't have any comment on them now. We were given
22 just before the start of the hearing a copy of the
23 motion that the Postal Service filed today, earlier
24 today, for to require us to sponsor an institutional
25 witness for cross-examination. Based on what they

1 have filed before my guess is that we will oppose it,
2 but I haven't read this for more than five seconds so
3 I can't say definitively.

4 COMMISSIONER BLAIR: At this point, Mr.
5 Levy, have you settled on a way of identifying names
6 or numbers, a system for identifying the names or
7 numbers with the protected documents to preserve
8 confidentiality as you introduce them into the case?

9 MR. LEVY: We will not be introducing or
10 referring to, because I'll be just asking Mr. Glick to
11 authenticate his prefiled testimony. The Postal
12 Service as I understand it, and I had a side
13 conversation with their counsel several days ago, but
14 my understanding this morning, from talking with them
15 this morning, is that they're going to be dealing with
16 it by having a two-phase hearing, the first one public
17 and the second one in-camera. But I think if I said
18 any more I'd be stepping on Mr. Mecone's prerogative
19 to say what he intends to do.

20 COMMISSIONER BLAIR: Mr. Mecone?

21 MR. MECONE: That's correct. I think we're
22 going to have, we're going to try to get as much into
23 the public session as possible. I've provided Mr.
24 Glick with the binder of the documents, and where
25 appropriate I'll just point to a certain line without

1 actually disclosing what's there, but I do anticipate
2 that we'll need a closed session to deal with some of
3 the issues.

4 COMMISSIONER BLAIR: I just think it's
5 important to have a system for us in order for the
6 court reporter to have that as well, so I didn't know
7 if you all had agreed on any kind of system in
8 advance, but we can proceed and we can address that as
9 the situation may require. I also ask GameFly counsel
10 if they intend to submit evidence, in submitting
11 evidence for the record what kind of evidence are you
12 going to be submitting first, will it be document,
13 will you be doing testimony? What's your procedure
14 for today?

15 MR. LEVY: Based on discussions with Postal
16 Service counsel and the Commission's counsel, my
17 understanding is we're going to do it in two steps.
18 In the public hearing I will simply have Mr. Glick
19 authenticate the public version of his testimony. In
20 the confidential or sealed hearing I will introduce
21 the proprietary version of his testimony, as well as
22 the documents that we intend to rely on that we
23 obtained from the Postal Service in discovery.

24 COMMISSIONER BLAIR: Okay. Well at this
25 point I will allow you the discretion to determine the

1 sequence as you find convenient, and also I will ask,
2 considering that the document came in today regarding
3 an institutional witness and the motion I would ask
4 that you prepare a response to that in seven days.
5 And we'll go ahead and proceed, we'll proceed from
6 here.

7 MR. LEVY: Thank you, Mr. Presiding Officer.

8 COMMISSIONER BLAIR: Does the Postal Service
9 counsel have any other information or requests for us
10 before we begin?

11 MR. HOLLIES: Mr. Presiding Officer, I guess
12 the Postal Service by filing its motion today
13 expresses its legal opinion to the effect that the
14 documents that GameFly relies upon, those that are
15 identified in its, in the memorandum filed as part of
16 its direct case need an appropriate foundation to
17 become part of the evidentiary record. And our motion
18 in effect is pointing out that no witness has
19 sponsored those, and the motion points out that that
20 problem is replete with the direct case of GameFly.

21 And so at this point we would submit that an
22 objection lies to the submission into the evidentiary
23 record at this time of those materials. If, however,
24 the Commission were to choose to accept those for
25 purposes of putting them into a transcript while

1 acknowledging that the evidentiary status of those
2 materials is yet an open matter, then I don't think
3 the Postal Service would have an objection.

4 COMMISSIONER BLAIR: Mr. Levy, do you have a
5 response?

6 MR. LEVY: Until the last sentence I thought
7 I was going to disagree, but let me just state briefly
8 our position because we've dealt with the general
9 issue before in our response to the motion to postpone
10 the hearing last week, and we will deal with it to the
11 extent appropriate in our response to the motion to
12 compel an institutional witness. But let me just say
13 briefly, there is no absolute requirement in the
14 Commission's Rules for a sponsoring witness or for
15 cross-examination of testimony.

16 Rule 3001.30(e)(3) just says the right to
17 cross-examination to the extent necessary for a full
18 and true disclosure of the facts necessary for the
19 disposition of the case. And these documents that are
20 at issue are all documents that were produced by the
21 Postal Service to us in response to our discovery
22 requests. By and large they are internal
23 communications within the Postal Service or they are
24 communications between the Postal Service and
25 customers like Netflix and Blockbuster.

1 There are two possible challenges to
2 documents that might lead to a request for a witness,
3 a sponsoring witness. One is, are the documents
4 authentic or has the party that is proffering them
5 altered them, fabricated them, or selectively deleted
6 from them? Well you don't need a witness for that if
7 the Postal Service can see what we've filed, and if
8 they think that we haven't accurately reproduced what
9 we received they can bring that to the Commission's
10 attention.

11 The other possible ground for traditionally
12 requiring a testifying witness is a hearsay rule, the
13 idea that you shouldn't accept evidence adverse to a
14 party without the party's opportunity to cross-examine
15 the declarant who made the statement. But even in
16 Federal courts which are much more strict about the
17 hearsay rule than our administrative agencies, there
18 are a number of recognized exceptions to the hearsay
19 rule, and they include business records and
20 admissions, which we believe these documents are.

21 And the reason why administrative agencies
22 are less strict about the hearsay rule is, you're not,
23 you're sitting here as an expert body, as Commissioner
24 Hammond pointed out, and you're not here protecting a
25 lay jury that might be unduly influenced. If you see

1 stuff that comes in and you say, well I can't credit
2 this, this isn't credible, you have the capacity not
3 to give it weight. In addition as an expert body you
4 can to some extent more than a court or a jury make an
5 independent adjudication.

6 So for those reasons we think that these
7 fall within the circumstances where due process and
8 the rule I just cited do not require a sponsoring
9 witness. And think about the practical circumstances.
10 I mean these documents go to the question of whether
11 the Postal Service was treating one or two of its
12 customers differently than a third customer, namely my
13 client. And they involve private communications
14 within the Postal Service with other parties, to which
15 no GameFly witness was privy. So GameFly cannot
16 possibly put on a sponsoring witness for those
17 documents because nobody at GameFly, neither Mr. Glick
18 nor Mr. Hortis nor anybody else at the company nor the
19 lawyers here were witnesses to those communications.

20 So if the Commission is to require a
21 sponsoring witness for those documents, which we think
22 are quite relevant, then what we're going to be
23 needing to do is to subpoena dozens if not hundreds of
24 Postal Service employees to get them on the stand and
25 ask them if they wrote it and so forth. That's

1 neither necessary nor sensible. Having said all of
2 that, I agree that the most sensible procedure would
3 be to let them in, if the Postal Service sees them
4 they want to file a renewed motion to strike or
5 exclude them then we'll respond and we can deal with
6 it in an appropriate fashion.

7 COMMISSIONER BLAIR: Mr. Hollies, did you
8 want to respond?

9 MR. HOLLIES: Well, I think the Commission
10 can and should defer judgment until such time as the
11 motion that we have filed has drawn the response that
12 has been promised. And I was hopeful when Mr. Levy
13 started out when he referenced that he had some doubts
14 about what I had said until I got to the last sentence
15 and that we might return to that juncture, which was
16 that we can certainly put those documents into a
17 transcript but leave their evidentiary status as
18 something yet to be resolved.

19 COMMISSIONER BLAIR: Well, for purposes of
20 the hearing today -- I'm sorry. Thank you, Mr. May.
21 At this time we'll allow GameFly to proceed, we'll ask
22 that you make your objection on a timely basis, it'll
23 be noted for the record, and at that point we can
24 discuss if you'll a motion to strike or what other
25 motions you'll have available to you. So at this

1 point I'd like to ask Mr. Levy to proceed and identify
2 your witness so that we can swear him in.

3 MR. LEVY: Thank you. GameFly tenders
4 Sander Glick as its witness. Mr. Glick is seated at
5 the witness's table.

6 COMMISSIONER BLAIR: Mr. Glick, will you
7 stand please?

8 Whereupon,

9 SANDER GLICK

10 having been duly sworn, was called as a
11 witness and was examined and testified as follows:

12 COMMISSIONER BLAIR: Thank you, Mr. Glick.
13 Mr. Levy, can you proceed please?

14 MR. LEVY: Yes, sir.

15 DIRECT EXAMINATION

16 BY MR. LEVY:

17 Q Mr. Glick, are you the same individual by
18 that name who was the sponsor of testimony for GameFly
19 in this case that was marked GFL-T-1?

20 (The document referred to was
21 marked for identification as
22 Exhibit GFL-T-1.)

23 A Yes I was, yes I am.

24 Q And there were both a public and a
25 proprietary version of the testimony?

1 A Yes.

2 Q So you have before you two copies of the
3 public version?

4 A Yes I do.

5 Q Have you had a chance to review them?

6 A Yes I have.

7 Q Was that public testimony prepared by you or
8 under your supervision?

9 A Yes.

10 Q If you were to testify today would you make
11 any changes to the, just to the public version?

12 A No I wouldn't.

13 MR. LEVY: I am handing the two copies of
14 the public version of Mr. Glick's testimony to the
15 Court Reporter and I ask that they be entered into
16 evidence and transcribed into the record.

17 COMMISSIONER BLAIR: Any objections?

18 MR. HOLLIES: No.

19 COMMISSIONER BLAIR: No objections. Hearing
20 none, the direct testimony of Mr. Glick on behalf of
21 GameFly, Incorporated, is received into evidence.

22 (The document referred to,
23 previously identified as
24 Exhibit GFL-T-1, was received
25 in evidence.)

PUBLIC (REDACTED) VERSION

GFL-T-1

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

TESTIMONY OF SANDER GLICK FOR GAMEFLY, INC.

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June 16, 2010

**TESTIMONY OF SANDER GLICK
FOR GAMEFLY, INC.**

I. INTRODUCTION

My name is Sander A. Glick. I am a Vice-President and co-founder of SLS Consulting, Inc., a Washington, D.C. consulting firm specializing in postal economics. I have testified before the Postal Rate Commission in Docket Nos. R97-1, R2000-1, and R2006-1. My previous testimony has generally related to estimating Postal Service costs and designing postal rates.

I attended the Maxwell School of Citizenship and Public Affairs at Syracuse University, where I received a Masters of Public Administration in 1994, and Carleton College, where I received a Bachelor's Degree, magna cum laude, in Physics in 1993.

GameFly has asked me to (1) estimate the difference in the Postal Service's costs of handling Netflix and GameFly DVD mailers, and (2) compare this cost difference to the difference in average postage per piece paid by the two companies.

II. SUMMARY OF CONCLUSIONS

GameFly pays about **[BEGIN USPS PROTECTED]** **[END USPS PROTECTED]** more in postage than Netflix does for an average round trip DVD mailing. By contrast, the difference in cost incurred by the Postal Service in handling the two companies' DVD mailers is **[BEGIN USPS PROTECTED]**

1 **[END USPS PROTECTED]** per round trip. The following table
2 shows these results.

3 **[BEGIN USPS PROTECTED]**

4

5

6

7 **[END USPS PROTECTED]**

8 Section III of this testimony explains how I determined the difference in
9 postage per piece. Section IV explains how I determined the difference in cost.
10 The appendices and workpapers to this testimony provide supporting details.

11 **III. GAMEFLY PAYS [BEGIN USPS PROTECTED] [END USPS**
12 **PROTECTED] MORE IN POSTAGE THAN NETFLIX PAYS FOR A DVD**
13 **MAILER ROUND TRIP.**

14 Both GameFly and Netflix send DVDs to their customers (outbound
15 pieces) and receive the DVDs back from their customers (inbound or return
16 pieces). As shown in Table 1 above, GameFly pays **[BEGIN USPS**
17 **PROTECTED] [END USPS PROTECTED]** more postage than Netflix
18 for its outbound pieces and 61 cents more postage than Netflix for its inbound
19 pieces. Source: Table A-1.

1 For inbound pieces, the postage difference is simply the two-ounce rate
 2 for Single-Piece flats (\$1.05) minus the one-ounce rate for Single-Piece letters
 3 (\$0.44). Joint Statement of Undisputed and Disputed Facts, ¶¶ 48, 62, and 70.
 4 The postage difference is higher for outbound pieces because Netflix mails most
 5 of its outbound pieces at Presort Letter rates while GameFly mails its outbound
 6 pieces at Single-Piece flat rates. Joint Statement of Undisputed and Disputed
 7 Facts, ¶ 67.

8 **[BEGIN USPS PROTECTED]**

9

10

11

12

[END USPS PROTECTED]

13 Please also note that in calculating GameFly's postage on return mail
 14 pieces I have excluded business reply mail (BRM) fees paid by GameFly. I also
 15 excluded the corresponding costs.

16 **IV. THE DIFFERENCE IN THE POSTAL SERVICE'S COST OF HANDLING**
 17 **GAMEFLY AND NETFLIX DVD MAILERS IS [BEGIN USPS**
 18 **PROTECTED] [END USPS**
 19 **PROTECTED] PER ROUND-TRIP.**

20 **A. Summary**

21 The difference in USPS cost between Netflix and GameFly mail pieces is
 22 **[BEGIN USPS PROTECTED] [END USPS**
 23 **PROTECTED]** per round trip. According to Netflix cost estimates developed by

1 Christensen Associates¹ and GameFly cost estimates I developed,² handling a
2 GameFly outbound mail piece costs the Postal Service [BEGIN USPS
3 PROTECTED] [END USPS PROTECTED] on
4 average to handle than a Netflix outbound piece.³ The cost difference between
5 GameFly's and Netflix's inbound mail pieces is [BEGIN USPS PROTECTED]
6 [END USPS PROTECTED] These figures are summarized
7 above in Table 1.

8 Because the purpose of this testimony is to estimate the USPS cost
9 difference between GameFly and Netflix mail pieces, I estimated USPS costs for

¹ [BEGIN USPS PROTECTED]

[END

USPS PROTECTED]

² The Postal Service has described the Christensen cost models as [BEGIN
USPS PROTECTED]

[END USPS PROTECTED]

³ This is partially because Netflix mail is presorted, which expands the postage
difference as well as the cost difference.

⁴ [BEGIN USPS PROTECTED]

[END USPS PROTECTED]

1 GameFly mail pieces using the Netflix cost models developed by Christensen
2 Associates.⁵ I adjusted the models to incorporate differences in the mail
3 characteristics of and processing methods for GameFly and Netflix mail pieces.
4 This approach ensures that estimated cost differences are not due simply to the
5 use of different modeling approaches.

6 **B. Estimation Of The Cost Of Handling Netflix DVD Mailers**

7 **[BEGIN USPS PROTECTED]**

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⁵ **[BEGIN USPS PROTECTED]**

[END USPS PROTECTED]

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[END USPS PROTECTED]

21 Finally, the use of nonstandard approaches for handling Netflix mail drives
22 up cost. As the Postal Service noted in the FY 2009 Comprehensive Statement

1 on Postal Operations (at 23), "Standardization has a major role in improving
2 service and efficiency in all operations and support activities."

3 **C. Estimation Of The Cost Of Processing GameFly DVD Mailers**

4 This section discusses key assumptions and how I used the Netflix cost
5 models to estimate the cost of GameFly mail pieces. The adjusted models that I
6 used to estimate the costs of inbound GameFly mail pieces are in Appendix A,
7 Tables A-5 and A-6.

8 **1. Outbound GameFly pieces**

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17 **[END USPS PROTECTED]** Because GameFly's outbound mail pieces are
18 barcoded and entered in nonpresorted tubs, I modified the mail flows so that
19 GameFly's pieces are first processed in the Outgoing Primary operation.⁷

⁶ **[BEGIN USPS PROTECTED]**

[END USPS PROTECTED]

⁷ **[BEGIN USPS PROTECTED]**

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PROTECTED]

[END USPS

⁸ [BEGIN USPS PROTECTED]

PROTECTED]

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12 USPS PROTECTED]

13 2. Inbound GameFly pieces

14 I also modified the Netflix inbound cost model to reflect GameFly-specific
15 values. [BEGIN USPS PROTECTED]

⁹ [BEGIN USPS PROTECTED]

[END USPS PROTECTED]

¹⁰ [BEGIN USPS PROTECTED]

[END USPS PROTECTED]

¹¹ [BEGIN USPS PROTECTED]

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¹² [BEGIN USPS PROTECTED]

[END USPS PROTECTED]

¹³ [BEGIN USPS PROTECTED]

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USPS PROTECTED]

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¹⁵ Please note that GameFly could mail its pieces in mailers that are similar in weight to Netflix's mailers. The higher weight of GameFly's pieces is to reduce automated letter processing and thus DVD breakage. Netflix, on the other hand, has not had to redesign its pieces for this reason because Netflix avoids letter automation through the special handling provided by the Postal Service at no extra charge.

¹⁶ **[BEGIN USPS PROTECTED]**

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[END USPS PROTECTED]**[END USPS PROTECTED]**¹⁷ **[BEGIN USPS PROTECTED]****[END USPS PROTECTED]**

1 MR. LEVY: With that, Mr. Glick is available
2 for questioning.

3 COMMISSIONER BLAIR: Mr. Hollies, Mr.
4 Mecone?

5 MR. MECONE: Yes, it's James Mecone for the
6 United States Postal Service.

7 CROSS-EXAMINATION

8 BY MR. MECONE:

9 Q Mr. Glick, in your testimony you state that
10 you specialize in estimating Postal Service costs,
11 designing postal rates. Could you please explain some
12 of you experience related to these matters?

13 A I've testified on multiple occasions before
14 the Commission on rate design and periodical standard
15 mail. And in those pieces of testimony I've developed
16 both cost avoidance estimates and rate designs.

17 Q Okay, without identifying any individual
18 clients, what type of clients do you normally consult
19 for?

20 A Most of my testimony's been on behalf of
21 mailing associations.

22 Q Have you ever testified on behalf of the
23 United States Postal Service?

24 A I have not.

25 Q Can you explain what you did in preparation

1 for this testimony -- what you reviewed, if you
2 observed any mail processing operations?

3 A I reviewed interrogatory responses of Postal
4 Service employees, that was the primary. I reviewed
5 most of the documents or much of the documents
6 provided by the Postal Service in response to
7 discovery.

8 Q Did you speak with any GameFly managers or
9 employees?

10 A I have had conversations with GameFly
11 employees. It's not the basis of my testimony.

12 Q Okay, and did you observe any mail
13 processing of Netflix mail or GameFly mail in
14 preparation for this testimony?

15 A No.

16 Q Okay. Even internal processing within the
17 GameFly centers, distribution centers?

18 A No.

19 Q No, okay. Before putting together testimony
20 were you instructed to reach a specific conclusion?

21 A No.

22 Q Okay, is it your understanding, this is
23 dealing with Postal Service pricing and costs, is it
24 your understanding that each piece of mail that is
25 charged the same rate costs the same amount for the

1 Postal Service to process?

2 A Can you restate the question?

3 Q Okay, sure.

4 A Or I mean can you just repeat it?

5 Q Sure. Is it your understanding that each
6 piece of mail that the Postal Service imposes the same
7 rate on, that each piece costs the Postal Service the
8 same amount to process? So, you know, two pieces of
9 mail that are paying the same rate, are the costs the
10 same, is that your understanding of how it works?

11 A My understanding of how it works is in
12 traditional postal rate making that within the
13 subclass the general goal is, you know, based upon
14 efficient component pricing, which is that the
15 difference in rate relates to the difference in cost.
16 So if there was no difference in rate, if there's no
17 difference in cost there shouldn't be a difference in
18 rate. Across classes, across subclasses, that may or
19 may not be true. But within a subclass the tradition
20 has been that rates reflect costs.

21 Q So two, say there's two pieces of mail that
22 the sender pays 44 cents for each piece. Is it your
23 understanding that those two pieces would cost the
24 Postal Service the same amount to process?

25 A Within single piece mail?

1 Q Yes.

2 A I believe there is a range of costs within
3 single piece mail.

4 Q Okay. Do you know why the Postal Service
5 uses that type of policy rather than maybe having more
6 classes where every piece of mail that paid the same
7 rate costs the same?

8 A I suspect it somewhat has to do with
9 simplicity. I and others have suggested that maybe
10 that's not the best approach, but simplicity is
11 probably part of that.

12 Q Okay, so you said that there was a range for
13 each postage rate?

14 A I said within single piece.

15 Q Okay.

16 A Within that particular one, that's what you
17 were asking about.

18 Q How wide of a range do you think that is?

19 A I don't know.

20 Q You don't know. Can you give me any type of
21 estimate?

22 A I haven't analyzed the range of costs within
23 first class mail single piece. Generally,
24 particularly within products mailed by companies,
25 there is an attempt to align rates with costs. And so

1 the relationship between rates and costs would be more
2 close.

3 Q So would it surprise you that a piece of
4 mail that costs 44 cents actually, that was postage
5 was 44 cents, the cost would be double that, or do you
6 think that would be too high of a range?

7 MR. LEVY: I'm going to object to that.
8 There is no foundation for this hypothetical.

9 COMMISSIONER BLAIR: Would you like to
10 respond?

11 MR. MECONE: I would just, well, Mr. Glick's
12 testimony compares costs and, the cost of processing
13 and the rates paid for two different classes, and I'm
14 trying to see what the range is for each class, the
15 range of postage and the range of costs for each
16 class, see how they compare.

17 COMMISSIONER BLAIR: Well I'll allow it at
18 this time, but if you continue your objection please
19 file it in the form of a motion to strike and then we
20 can proceed, but I'll allow it at this time subject to
21 further motions.

22 THE WITNESS: Can I make a comment? This
23 isn't a situation where we're talking about two
24 different classes. We're talking about two different
25 mailers that both send and receive DVDs using first

1 class mail.

2 BY MR. MECONE:

3 Q So I guess how wide the range between one
4 price category, how wide would the range of the cost
5 of processing be?

6 A Can you restate it?

7 Q Okay, for two pieces of mail within the same
8 price category?

9 A Can you define "a price category"?

10 Q Okay, say like a one-ounce letter, a one-
11 ounce flat?

12 A Okay, as in two different --

13 Q So two examples of a price category.

14 A Okay.

15 Q So for a particular price category, say a
16 one-ounce letter, what is your understanding of the
17 range of costs of the Postal Service to process a
18 piece of mail?

19 A I think that it depends significantly on
20 what price category you're referring to. That, for
21 example let's take a three-digit automation letter. I
22 suspect that there's probably not a significant amount
23 of price variation within that. Within a single piece
24 category, I think that it's likely to be more. I have
25 not analyzed that.

1 Q Based on your understanding, would this
2 constitute discrimination, the way the Postal Service
3 does this where they impose the same postage rate onto
4 a piece of mail in the same price category that costs
5 different to process?

6 A I mean I guess, I'm not a lawyer, I'm not
7 comfortable defining discrimination.

8 Q Okay. Based on your understanding of the
9 ranges of costs between price categories would it be
10 possible for one of the higher cost pieces in the one-
11 ounce letter price category to cost more than one of
12 the lower cost pieces of mail that falls in the two-
13 ounce flat category? Do you want me to restate?

14 A Yes I would.

15 Q Okay. So there's one of the lower cost
16 pieces in the one-ounce letter category as compared
17 with the -- one of the higher cost pieces in the one-
18 ounce letter category compared with one of the lower
19 cost pieces in the two-ounce flat category, so you
20 stay within the range of costs in each category. So
21 would it be possible that the bottom range in the two-
22 ounce flat category would overlap with the top cost
23 range in the one-ounce letter category?

24 MR. LEVY: I'm going to ask counsel to
25 clarify whether this question is focusing on DVD mail

1 in both of the compared categories or whether it's
2 talking about all first class one-ounce mail.

3 BY MR. MECONE:

4 Q Well first let's talk about just generally.

5 A I think I've heard a Postal Service lawyer
6 to say that whenever someone asks you a question of is
7 it possible within the Postal Service for something to
8 happen that yes it is possible. I haven't analyzed
9 that, but yes I think it's theoretically possible and.

10 Q And you have no opinion on the legal whether
11 this would constitute legal discrimination?

12 A I certainly have no perspective on whether
13 this is legal discrimination, yes, that's a fair
14 statement.

15 Q Okay. For purposes of your testimony, what
16 postage rate did you assume that GameFly paid?

17 A The two-ounce single piece flat rate.

18 Q Okay, and what type of mail processing did
19 you assume GameFly received?

20 A I mean that's laid out clearly in my
21 testimony.

22 Q Okay, could you please state it for the
23 record?

24 A For the record, my testimony says in general
25 that on the outbound leg it received AFSM-100

1 processing, on the inbound leg it receives a
2 combination of ASFM-100 processing, manual flat
3 processing, and other types of processing that are
4 consistent with, you know, that I saw -- well, those
5 are general aspects. I don't really want to go into
6 anything else that's confidential.

7 Q So flat's not letter processing?

8 A Automated flat sorting and manual
9 processing.

10 Q Okay. For purposes of your testimony what
11 postage rate did you assume Netflix paid?

12 A I think part of this is confidential and
13 part of it's not. On the way back -- well, actually
14 no this is a detailed calculation, but Netflix on the
15 way out was at a presort letter with a combination of
16 rate categories and single piece, and on the way back,
17 single piece letter.

18 Q Okay, you didn't mention any of the postage
19 paid in form, like how much it actually cost, but
20 generally the postage that GameFly paid was higher
21 than the postage Netflix paid, is that right?

22 A That's accurate. GameFly has not been
23 offered manual processing at the one-ounce letter
24 rate, and so yes they do pay more.

25 Q Okay, how do you know that GameFly has not

1 been offered, what was the basis of that statement,
2 that GameFly has not been offered the processing you
3 just described?

4 A Well it was requested before we filed the
5 complaint (a), and (b) there have been numerous
6 filings that GameFly has made that has covered that
7 topic. I don't know that I could put my finger on a
8 particular document unless you want me to search. I
9 think Mr. Levy probably could.

10 Q You just, you made that statements based on
11 what you've been told by GameFly, you didn't do any
12 independent investigation?

13 A I don't agree with that statement.

14 Q So did you do some independent investigation
15 to find the truth of that statement?

16 A Yeah, the independent investigation was
17 simply that GameFly requested it before we filed the
18 complaint and the Postal Service denied it. Also, I
19 mean, you know, there is a USPS response that
20 suggested that yes it would allow -- you know, I'm
21 again worried that that's under seal, but I have
22 reviewed interrogatories, I have reviewed the
23 complaint, and my independent investigation of that,
24 that's the scope of my investigation. Have I had
25 conversations with GameFly about it? They've been in

1 -- I have been on conference calls where we have
2 discussed that.

3 Q Well this is one of the issues that's been
4 raised, you know, just in GameFly's pleadings and
5 we're trying to get more information on what the basis
6 is for that statement because we, you know, in our
7 pleadings we've said inconsistent things, so this is,
8 you know, we'd like to be able to cross-examine you
9 about this. It sounds like you don't have a lot of
10 information regarding who actually made the statement,
11 who requested it, what was said in denial and things
12 like that?

13 A I think it's clear that, I mean if you look
14 at the complaint it's clear that GameFly requested
15 this and that the Postal Service didn't respond to it.

16 Q Well the complaint is, I mean it's GameFly's
17 pleadings and it's not evidence, or --

18 A Well I guess this is something which, if the
19 Postal Service replied to the request of GameFly I
20 would think that they would have indicated that at
21 this point. I don't understand the implication, I
22 don't understand what more is needed.

23 Q In your testimony you made kind of a similar
24 statement, page 11 at footnote 15. You state that
25 GameFly could mail its pieces in mailers that are

1 similar in weight to Netflix mailers and that the
2 higher rate of GameFly's pieces, the reason they have
3 the higher rate is to reduce automated letter
4 processing and thus DVD breakage. Do you know if
5 GameFly's ever actually tried to mail their pieces in
6 a mailer similar, of similar weight to Netflix
7 mailers?

8 A I believe that they gave an interrogatory
9 response that said that they haven't done that.

10 Q Do you know why they have not done that?

11 A Because they haven't been offered normal
12 processing at the one-ounce letter price.

13 Q So how did they know that this would cause
14 increased breakage if they never actually tried to
15 mail their letters in that way?

16 A The record in this case of the documents
17 cited in the road map or in the memorandum, I think
18 any reasonable person who would look through that
19 would conclude that.

20 Q Are there any specific documents you're
21 referring to?

22 A I believe that in response to Interrogatory
23 73 from the Postal Service there is, I don't know that
24 it's a comprehensive list of citations but it's a
25 pretty long list of citations on the topic, and I

1 think that there are also references in response to
2 some other interrogatories somewhere around 73.

3 Q Are you aware that the Postal Service
4 offered GameFly the same processing as Netflix -- or
5 processing on the same terms as Netflix?

6 MR. LEVY: I am going to object to that and
7 to this line of questioning. In Interrogatory 63 we
8 asked the Postal Service whether it would give GameFly
9 the same level of manual processing that it gave to
10 Netflix at the same price, and the Postal Service
11 response to question number 63 was that they couldn't
12 guarantee that because it was left to the discretion
13 of local field officials. So I think this issue has
14 been answered already by the Postal Service.

15 MR. MECONE: That response doesn't deny, it
16 just explains that it would leave it to local
17 officials, that doesn't deny that that wouldn't be the
18 same terms as Netflix.

19 COMMISSIONER BLAIR: I'm not sure I
20 understand your response. Can you be a little bit
21 more clear?

22 MR. MECONE: Okay. Well the interrogatory
23 asked a different question I just asked the Witness.
24 I asked the Witness if he was aware that the Postal
25 Service offered GameFly processing on the same terms

1 as Netflix. The interrogatory asked for something
2 different than that I believe.

3 MR. LEVY: This issue has been raised
4 several times, because we suspected the Postal Service
5 would claim that we didn't ask, and so question number
6 63 we asked whether they would provide the same level
7 of manual processing at the same price that Netflix
8 gets, and they refused to submit to it. More recently
9 they sent a letter which I think they attached to a
10 recent pleading suggesting what we would have to do
11 and what hoops we would have to jump through to get
12 manual processing.

13 But the letter makes clear that even if we
14 jump through those hoops there would be no commitment
15 from the Postal Service if we'd ask, do I get the same
16 level of manual processing? Moreover, the Postal
17 Service has spent about the last year litigating
18 against our requests for the same level of manual
19 processing. The idea at this point there's a live
20 issue about the Postal Service is willing to offer it,
21 I mean it's kind of ridiculous.

22 COMMISSIONER BLAIR: Mr. Levy, are you
23 suggesting that this Witness then is not able to
24 respond to that question, it may come from an
25 institutional witness?

1 MR. LEVY: No, I'm making the objection that
2 this is not a factual issue in dispute. The Postal
3 Service by its filings has made admissions that it's
4 not going to provide it. If they are changing their
5 position then they can say so on the record. But what
6 the Postal Service is willing to offer GameFly is not
7 a subject that this Witness can control, let alone
8 testify about.

9 COMMISSIONER BLAIR: Mr. Glick, are you
10 capable of, are you able to answer this question?

11 THE WITNESS: I can do my best.

12 COMMISSIONER BLAIR: Okay.

13 THE WITNESS: I have seen no offer from the
14 Postal Service to GameFly of the same level of manual
15 processing that it has offered and provided to
16 Netflix.

17 BY MR. MECONE:

18 Q What is that the Postal Service offered and
19 provided to Netflix?

20 A Do we really want to have this conversation
21 in a public hearing?

22 MR. MECONE: Okay, we can leave it at this
23 and say in a closed session.

24 COMMISSIONER BLAIR: Do you have further
25 cross-examination?

1 MR. MECONE: Yes.

2 COMMISSIONER BLAIR: Okay.

3 BY MR. MECONE:

4 Q Okay, I'm going to go back to the discussion
5 about the flats versus letter mail in your testimony.

6 A Well can you tell me what we're talking
7 about?

8 Q Yeah, I'm going to. You talked about price
9 differences, and a mailer would be aware of the
10 differences in price between a flat piece of mail and
11 a letter piece of mail?

12 A I think it's fair to say that GameFly knows
13 how much more they pay because they're mailing a piece
14 at the two-ounce flat.

15 Q And why would generally allow their mailer
16 fees to mail a piece as a flat rather than a letter?

17 A In general?

18 Q Yes.

19 A I think, I don't know if that answer can be
20 given in general. I think that, I'd be happy to
21 answer it in a specific case.

22 Q Okay, that's fine.

23 A My understanding from reviewing documents is
24 that automated letter processing increases breakage
25 for DVDs. For mailers that have not been offered

1 manual processing at the one-ounce letter rate, they
2 have the option of mailing them at one-ounce letter
3 and suffering breakage, higher breakage, or mailing
4 them as a flat and incurring less breakage. So
5 GameFly is left with a choice between those two, and
6 in the absence of being given the manual processing it
7 has a choice between two bad options, and it's chosen
8 to mail it as a two-ounce automation flat between
9 those two options.

10 Q There are other DVD mailers that still
11 choose to mail their DVDs at letter, is that right?

12 A Yes.

13 Q Okay. And presumably they would still
14 consider the price differences and the breakage and
15 all that?

16 A I would presume so.

17 Q Do mailers generally know, your
18 understanding that mailers generally know how their
19 mail is actually processed?

20 A I think some probably do and some probably
21 don't.

22 Q Is it your understanding that the Postal
23 Service promises a particular type of processing based
24 on shapes?

25 A Do you want to define "promise"?

1 Q Is there anything in writing?

2 A I think that there is an expectation that, I
3 think there is an expectation that flats generally go
4 in this processing path, letter typically go in this
5 processing path, and that's well understood.

6 Q In your testimony you calculated the postage
7 and cost differences that would result if GameFly
8 mailed its DVDs as letters rather than flats?

9 A I'm sorry, could you repeat that?

10 Q Sure. Did you calculate the postage and
11 cost differences between GameFly and Netflix that
12 would occur if GameFly mailed its DVDs as letters
13 instead of flats?

14 A No.

15 Q Did you calculate the postage and cost
16 differences that would occur if GameFly mailed its
17 pieces as one-ounce flats rather than two-ounce flats?

18 A Did you say postage difference or cost?

19 Q Postage and cost differences?

20 A I didn't calculate it, but it's a pretty
21 simple calculation to do a postage calculation with a
22 one-ounce flat. From a cost perspective, you know,
23 that's a different, it could result in a different
24 mail flow, and so no I definitely didn't do that. But
25 the postage calculations on both comparing to a one-

1 ounce flat or comparing to a one-ounce letter are
2 calculations that I didn't perform but are relatively
3 straightforward.

4 Q So just to be clear, your testimony, in
5 compiling the calculations for your testimony you
6 assumed that Netflix and GameFly paid different rates?

7 A Yes.

8 Q And you also assume they receive different
9 types of service, processing?

10 A Yes, with the same goal of avoiding
11 automated letter process.

12 Q And now I'm going to try to assess your
13 understanding of the Manual's culling model that you
14 used to compile some of these costs and postage
15 numbers. Can you, I guess you said you didn't observe
16 any of the processing of Netflix or GameFly mail, but
17 did you put together a model of the different steps
18 that would be involved with the processing of Netflix
19 mail?

20 A Christensen Associates did that.

21 Q So you didn't investigate whether that was
22 an accurate portrayal of how the mail is actually
23 processed, you didn't do any independent
24 investigation, right?

25 A The only, in general I accepted that as

1 true. I mean I think Christensen in general does a
2 good job. Yeah, we certainly asked questions and we
3 got responses from the Postal Service on how
4 processing practices for Netflix mail have changed
5 over time, in interrogatories, and I believe those
6 responses are public, but just in case they aren't.

7 Q Putting together this model, is it your
8 understanding that every plant processed, met this
9 mail the same way, was it uniform or were there
10 differences at a local level?

11 A I think that there were key components that
12 were consistent across plants, but they weren't
13 exactly the same.

14 Q So did you assume that every plant used
15 manual culling to process Netflix mail?

16 A I didn't estimate the cost for Netflix.
17 Christensen Associates modeled that, and they modeled
18 it based upon the data they collected at individual
19 plants and then developed a weighted average across
20 the country. So I think the answer is that
21 Christensen did not make the assumptions that you laid
22 out in your question.

23 MR. LEVY: Excuse me. I am not going to
24 interrupt about whether they should be under a seal.
25 These are documents which if anybody wants to claim is

1 proprietary it's the Postal Service's claim, so I'm
2 going to keep quiet.

3 THE WITNESS: I believe the Christensen
4 report is not under seal at this point.

5 BY MR. MECONE:

6 Q For your calculations in your testimony you
7 looked at both outbound and inbound mail, is that
8 correct?

9 A Yeah that's correct.

10 Q Okay. And what's your understanding of how
11 outbound Netflix mail is processed, did you just go by
12 the Christensen report on that?

13 A That's correct.

14 Q Okay. And based on that was your
15 understanding that it's processed manually or
16 automated?

17 A I think that the report showed that it was
18 generally processed on letter automation although not
19 entirely, not necessarily entirely through the entire
20 process. You know, there are some documents that shed
21 some doubt on whether it's always automated, but there
22 certainly is, you know, the documents show that
23 there's a higher likelihood of automated processing on
24 the way out.

25 Q Okay. Is that the way most one-ounce first

1 class letter mail would be processed, would that
2 differ in any way from the ordinary processing?

3 A Automated letter processing?

4 Q Yes.

5 A I don't believe that their processing is
6 exactly the same. But in general, yes, I think that -
7 - sorry. I think that Netflix outbound pieces are
8 processed more similarly to kind of the typical
9 automation letters than are their inbound pieces.

10 Q Okay. So is it your understanding that
11 GameFly contends that Netflix receives any special
12 treatment on its outbound mail?

13 A I'd say the focus is on the inbound.

14 Q All right. But you included both the
15 outbound and inbound in your calculations, right?

16 A Yeah, basically what I tried to do was
17 compare the postage difference for a round trip with
18 the cost difference for a round trip.

19 Q So I think in your testimony you state the
20 round trip difference, but that includes a portion of
21 the outbound trip where there's really no allegation
22 of any special treatment, right?

23 A I would say the main allegation relates to
24 the inbound trip. I'm not sure that I'm -- I mean
25 there's enough references in the documents under seal

1 that I'm not willing to say that it's only on inbound,
2 but I agree that it's primarily on inbound.

3 Q Okay, so looking at your testimony here on
4 the first page, line 18, there's a number there, it's
5 proprietary so we don't want to expose what the number
6 is, but that would include any differences on both the
7 inbound and the outbound, right?

8 A Right, and it reflects, as you mentioned
9 before, that Netflix qualified for presort letter
10 rates on the outbound trips.

11 Q Are those rates available to GameFly?

12 A They are available to GameFly. I've
13 explained why they don't take advantage of those
14 rates.

15 Q Okay. So in that cost difference then, I
16 mean I guess that takes into account that special
17 discount right?

18 A Well I mean that's the presort discount,
19 yeah. Both -- I don't want to get into the cost
20 differences, but what I attempted to do was estimate
21 the postage difference based upon how GameFly and
22 Netflix mail and the cost difference based upon how
23 Netflix and GameFly mail. So yeah, it takes into
24 account all of that. And you'd have to based upon the
25 Christensen approach.

1 Q But if in fact seems like you said, you
2 weren't sure about this, but you thought that outbound
3 Netflix mail is more similarly processed than other
4 mail, as similarly processed other mail than the
5 inbound. So I mean if the allegation of
6 discrimination only applies to the inbound then that
7 number would be including something that's not really
8 relevant.

9 A I absolutely disagree with that. I now I
10 understand where you're headed with this. I don't
11 agree with that. That GameFly mails its piece as a
12 flat, and to get the flat processing on the inbound
13 trip it's got to be, it's the same piece that's going
14 out on the outbound trip, so the postage difference
15 that GameFly's being faced with is both.

16 Q Okay, so in summary what do you assert that
17 your testimony shows, without getting into any
18 proprietary numbers or anything like that?

19 A It shows that GameFly pays a great deal more
20 for postage than Netflix does to achieve the same
21 goal, and it's not justified by the difference in the
22 processing cost.

23 Q But, okay, but you're comparing two
24 different price categories and two different types of
25 processing, right, is that right?

1 A I think my testimony's quite clear, I think
2 the similarities in processing is the avoidance of the
3 automated letter processing.

4 Q How does your testimony address any of the
5 elements of discrimination under 39 USC 403(c)?

6 A I believe that that's the job of the lawyer.
7 I don't believe that it does address that, I mean it's
8 input to the case.

9 MR. MECONE: That's all we have for this
10 portion of the testimony. We have some more questions
11 we'd like to ask in a closed session.

12 COMMISSIONER BLAIR: Okay, thank you very
13 much. At this point in the proceedings we have only
14 received one request for oral cross-examination from
15 any of the participants. Does any other participant
16 wish to cross-examine Mr. Glick?

17 MR. COSTICH: Commissioner Blair, Emmett
18 Costich with Public Representative. I would like to
19 follow up on some of the questions that have been
20 asked.

21 COMMISSIONER BLAIR: Please go -- with oral
22 cross?

23 MR. COSTICH: Yes.

24 COMMISSIONER BLAIR: Please go ahead.

25 //

1 CROSS-EXAMINATION

2 BY MR. COSTICH:

3 Q Good afternoon, Mr. Glick.

4 A Good afternoon.

5 Q Earlier there was some discussion between
6 you and Postal Service counsel about cost differences
7 within three-digit presort letter mail, do you recall
8 that?

9 A Yes.

10 Q You indicated that you didn't think there
11 would be much variation in cost for pieces that were
12 in that category, is that right?

13 A I think that there is less variation within
14 that category than there would be within a single
15 piece category, that was what I meant to imply.

16 Q Don't answer this if it's confidential, but
17 do Netflix letters cost more on average than the
18 average three-digit presorted one-ounce first class
19 piece?

20 A I don't think I have that number on me. I
21 believe so. I mean I think as we talked about before,
22 Netflix pieces are processed more similarly on the
23 outbound trip to a typical automation letter than on
24 the inbound trip, but it's not entirely, you know,
25 there are other streams that it falls into.

1 Q Going to the inbound trip, do Netflix pieces
2 cost more in that part, more than average single
3 piece?

4 A The Postal Service has indicated that
5 there's a substantial premium.

6 Q I'm sorry, what was that last?

7 MR. LEVY: That the Postal Service has
8 indicated that there is a substantial premium, is what
9 I heard.

10 COMMISSIONER BLAIR: I would urge the
11 attorneys and the Witness to speak directly into the
12 microphone. I understand there may be some microphone
13 problems out there.

14 THE WITNESS: I'm just trying not to be too
15 specific. I apologize for that.

16 MR. COSTICH: As a general matter I believe
17 that the specific Netflix numbers are proprietary
18 because they go into the precise amount of postage
19 that they pay as well as the presort mix, but if the
20 Netflix counsel tells me differently and he's sitting
21 in the hearing room then I would stand aside, but I
22 think that may be an issue.

23 COMMISSIONER BLAIR: Well we can at least
24 cover this in the in-camera proceeding as well.

25 BY MR. COSTICH:

1 Q Would it be possible for GameFly to change
2 its mailing practices and technology so as to send an
3 outbound one-ounce letter but have a two-ounce flat
4 come back?

5 A Not that I'm aware of.

6 MR. COSTICH: That's all I have.

7 COMMISSIONER BLAIR: And if you, would you
8 just please remind me during the in-camera proceeding
9 if you want to follow up on your one question. So
10 thank you very much. Any questions from the bench at
11 this point? Just the public rep, no one else had
12 asked to cross-examine at this point. So is there any
13 questions from the bench? Madam Chair?

14 CHAIRMAN GOLDWAY: No.

15 COMMISSIONER BLAIR: Commissioner Hammond?

16 COMMISSIONER HAMMOND: I don't have any,
17 thank you.

18 COMMISSIONER BLAIR: Commissioner Langley?

19 (No response.)

20 COMMISSIONER BLAIR: Mr. Levy, would you
21 like some time with your Witness to discuss the need
22 for redirect?

23 MR. LEVY: Just a minute or two please.

24 COMMISSIONER BLAIR: Okay, we will go off
25 record and go into recess for a couple minutes.

1 (Whereupon, a brief recess was taken.)

2 COMMISSIONER BLAIR: Mr. Levy, is there any
3 redirect at this time?

4 MR. LEVY: No redirect, Commissioner Blair.

5 COMMISSIONER BLAIR: Okay, well, if there's
6 nothing further with oral cross examination, I just
7 want to go through some procedures for the written
8 cross examination as well.

9 The Postal Service has designated written
10 cross examination, and this designation includes both
11 public and non-public materials. It includes
12 institutional responses by Gamefly as well as
13 responses by our witness, Mr. Glick.

14 This material will be treated as follows.
15 Public materials will be separately identified and
16 included in today's transcript as is our normal
17 practice. Non-public materials will be identified and
18 included in a separate, sealed transcript. Mr.
19 Mecone, will you identify the written cross
20 examination to be included in today's transcript?

21 MR. HOLLIES: Mr. Commissioner, this is Ken
22 Hollies for the Postal Service. This is an issue that
23 we addressed at the outset of today's hearing and the
24 need to extract certain sensitive information from
25 some of the materials. And it was for this reason

1 that we were not expecting to put matters into the
2 transcript today that might have such sensitive
3 information.

4 Now we also talked about some of the other
5 materials that have been designated. Some of those
6 presumably could be amenable to being split between
7 public and non-public materials. But at least as for
8 the material designated by the Postal Service, we do
9 not have those here with us today for the reasons we
10 then discussed. And we would expect to have that
11 material back to the Commission, I think July 2nd was
12 the date that we said. So our expectation was that
13 those materials would not in fact be put into a
14 transcript at this time.

15 COMMISSIONER BLAIR: Would that apply to
16 both non-public materials, requests for cross
17 examination, as well?

18 MR. HOLLIES: Yes, we have not extricated
19 the one from the other at this point, and we don't
20 believe there's anything in the public side that's
21 sensitive. But in the interests of being conservative
22 on that point, we would ask that the presiding officer
23 allow us to proceed as was described at the outset of
24 the hearing.

25 COMMISSIONER BLAIR: Mr. Levy, did you want

1 to be heard from on this?

2 MR. LEVY: Simply to say that that's
3 acceptable to Gamefly.

4 COMMISSIONER BLAIR: Without objection,
5 we'll wait until you said July 2nd?

6 Well, at this point, this should conclude
7 the public portion of today's hearing. We will recess
8 for 15 minutes and return for the in-camera portion of
9 our proceedings. And I would remind the witness that
10 he will be part of those proceedings and that he will
11 remain under oath. So, at this point, the hearing
12 will recess.

13 (Whereupon, a brief recess was taken; the
14 hearing will reconvene in confidential session.)

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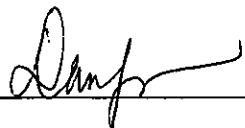
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REPORTER'S CERTIFICATE

DOCKET NO.: C2009-1
CASE TITLE: Complaint of Gamefly, Inc.
HEARING DATE: June 16, 2010
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Postal Regulatory Commission.

Date: June 16, 2010



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